FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 7 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

---

Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas ..... *Appellant,*

v. No. 138

Dixie Greyhound Lines, Inc. ..... *Appellee.*

---

## APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

## APPELLANT'S PETITION FOR REHEARING

---

Frank Pace, Jr.,
Attorney for State Revenue Department,
State Capitol,
Little Rock, Arkansas.
Amos M. Mathews,
204 South Canal Street,
Chicago, Illinois.
*Counsel for Appellant.*

DEMOCRAT P. & L. CO., LITTLE ROCK

# INDEX


Page

Certificate of counsel ..... 10


## CASES CITED


Bayside Fish Flour Co. v. Gentry, 297 U. S. 422 ..... 2, 7

Burnet v. Wells, 289 U. S. 670 ..... 7

Central Lumber Co. v. South Dakota, 226 U. S. 157 ..... 5

Eichholz v. Missouri, 306 U. S. 268, 59 Sup. Ct. 532 (U. S. 1939) ..... 3

Euclid v. Ambler Realty Co., 272 U. S. 365 ..... 8

Madden v. Kentucky, No. 92, decided Jan. 29, 1940, 84 L. Ed. (adv.) 406 ..... 8

New Mexico ex rel. McLean v. D. & R. G. Ry. Co., 203 U. S. 38 ..... 2, 6

New York ex rel. Silz v. Hesterberg, 211 U. S. 31 ..... 2, 3, 6, 7

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192 ..... 3, 5, 8

Sparling v. Refunding Board, 189 Ark. 189, 71 S. W. (2d) 182 ..... 2


### *Miscellaneous Authorities Cited*


Ex Parte No. MC-10, 2 Int. Com. Comm. Rpts., Motor Carrier Cases 703 ..... 9

Ex Parte No. MC-12, 1 id. 628 ..... 9

24 Iowa Law Review 796, May, 1939 ..... 2

32 Michigan Law Review 1, November, 1933 ..... 3

"Transport Topics," February 19, 1940, official publication of American Trucking Associations, Inc., editorial "The Arkansas Case" ..... 3

Page

*Statutes Cited*

Arkansas—Act 67, Regular Session of 1933 ..... 2, 3

Colorado—1935 Statutes Annotated, Vol. 2, Chap. 16, Sec. 382 (b) ..... 5

Idaho—1933 Session Laws, Chap. 46, Sec. 17 ..... 5

Illinois—1939 Rev. Stat., Bar Ass'n Ed., Chap. 120, Sec. 417 ..... 5

Indiana—Acts of 1935, p. 453 ..... 5

Iowa—Code of 1935, Sec. 5093—f 2 ..... 5

Kansas—1939 Laws, Chap. 226 ..... 5

Mississippi—1936 Laws, Chap. 162, Sec. 31 ..... 5

Nebraska—Compiled Statutes, 1939 Supplement, Sections 66-426 and 66-427 ..... 5

Nevada—1935 Statutes, Chap. 74, Sec. 2 ..... 5

New Jersey—1935 Laws, Chap. 319, Sec. 606, p. 1026 ..... 5

New Mexico—1937 Session Laws, Chap. 83, Sec. 2 ..... 5

Tennessee—1939 Public Acts, Chap. 81 ..... 5

Washington—1939 Session Laws, Chap. 177, Sec. 17 ..... 5

Wyoming—1935 Session Laws, Chap. 72, Sec. 14 ..... 5

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

---

Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas ..... *Appellant,*

v. No. 138

Dixie Greyhound Lines, Inc. ..... *Appellee.*

---

## APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

## APPELLANT'S PETITION FOR REHEARING

---

Appellant respectfully petitions the Court for a rehearing.

Appellant will not here reargue any point which is discussed in the prevailing or dissenting opinions. Appellant desires only to present and re-emphasize here a contention which was argued in his first brief, but which was not mentioned in the opinions. This point is important of itself, but its importance is much enlarged, and is made deserving of reconsideration, by reason of what was said in the prevailing opinions.

This point, briefly stated is, that Act 67 of 1933, can be sustained, independently of other reasons, as an aid to the enforcement of the gasoline tax laws of the state. It is stated in point II-C in the subject index to appellant's first brief and in the summary of argument on page 13. It is argued in pages 28-30; and decisions of this Court which have sustained state laws, or applications of state laws to specific situations, by invoking that principle, are cited there and in the footnote to page 17. Some of those state laws forbade or directly burdened interstate or foreign commerce, *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31, 40; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 426; *New Mexico ex rel. McLean* v. *D. & R. G. Ry. Co.*, 203 U. S. 38.

It is to be noted that the title to Act 67 of 1933, is:

> "*An Act to Better Enforce the Gasoline Tax, and for Other Purposes.*" (Emphasis supplied.) (Appellant's first brief, p. 4.)

As is pointed out in appellant's first brief, pages 16, 17, 19, and in the opinion of the Supreme Court of Arkansas, in *Sparling* v. *Refunding Board*, 189 Ark. 189, 71 S. W. (2d) 182, successive acts of the Legislature of Arkansas have been directed to better enforcement of the gasoline tax, which is pledged to the payment of outstanding highway construction bonds.

The principle for which appellant here contends was approved in 24 Iowa Law Review 796, 797, May, 1939, in a review of the opinion of the Circuit Court of Appeals in this case, 101 F. (2d) 572, in which it was said:

> "Even though the state might not have power, separately considered, to measure a privilege by this

gasoline brought into the state but not consumed there, it might have power under the 'penumbra' theory if it were incidental to and necessary for the enforcement of other admittedly constitutional powers. Cf. *Silz* v. *Hesterberg*, 211 U. S. 31 (1908); *Purity Extract* v. *Lynch*, 226 U. S. 192 (1912); *Eichholz* v. *Missouri*, 306 U. S. 268, 59 Sup. Ct. 532 (U. S. 1939). It would seem necessary to use the measure here held unconstitutional in order that the state may have a practicable means of charging-out-of-state motorists for using the highways on the basis of gasoline to be used in the state, and in order to prevent gasoline bootlegging or other tax avoidance. *Otherwise the highway compensation tax system would be jeopardized.*" (Emphasis supplied.)

In an article entitled "State Taxation of Interstate Motor Carriers" in 32 Michigan Law Review 1, November, 1933, in commenting upon recently enacted statutes like Act 67 it was said (p. 35, footnote):

> "It is believed, however, that since the ordinary private passenger car is not affected by these requirements, *and since these regulations are deemed essential in order to enforce legitimate revenue measures*, the Supreme Court will declare such practices to be neither an unreasonable burden on interstate commerce nor a violation of the 'tolls' provision of the Federal Aid highway legislation." (Emphasis supplied.)

The tremendous practical difficulty entailed by the Court's decision is emphasized in the editorial entitled "The Arkansas Case" in TRANSPORT TOPICS of February 19, 1940, that being the official publication of American Trucking Associations, Inc., 1013—16th Street, N. W., Washington, D. C., in which it is said:

"Moreover, the decision, by declaring that a state may not levy a tax on gasoline that is to be used in

another state, implies that a state may, if it desires, tax all the gasoline that is to be used within its borders. No state has adopted this procedure yet, but some of those whose laws dealing with excess gas are invalidated by the Arkansas decision, might decide to adopt it as a means of regaining revenue. Theoretically, every gallon of gasoline bought in one state and used in another could be subjected to duplicate taxation. If the states should resort to this procedure motor carriers would have to pay double taxes on their fuel or buy just enough gasoline at each state line to carry the vehicle across the state.

"*Obviously, if such procedure became widespread, the burden upon motor carriers would be much greater than that imposed by the Arkansas law.*" (Emphasis supplied.)

That passage from the editorial emphasizes (1) the fairness and propriety of the twenty gallons exemption as a means of relieving gasoline purchased in other states from the Arkansas tax, (2) the practical and administrative difficulties that will be encountered by both the states and the motor carriers under this decision, and (3) the necessity of Act 67 as an aid to the enforcement of the state's gasoline tax laws.

The necessity for statutes like Arkansas' has been recognized in at least fourteen other states. In the following states there are statutes identical in purpose and effect with that of Arkansas, requiring the tax on all gasoline brought into the state in the fuel tanks of motor vehicles in excess of a certain amount. The amounts exempted are shown in parenthesis.

That other states have found legislation like that in issue here to be necessary as an aid to the enforcement of

their gasoline tax laws favors the validity of the Arkansas laws. *Purity Extract & Tonic Co.* v. *Lynch, supra* (226 U. S. p. 204); *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157.

Colorado—1935 Statutes Annotated, Vol. 2, Chap. 16, Sec. 382 (b). (10 gals.).

Idaho—1933 Session Laws, Chap. 46, Sec. 17. (20 gals.).

Illinois—1939 Rev. Stat., Bar Assn. Ed., Chap. 120, Sec. 417. (20 gals.).

Indiana—Acts of 1935, p. 453. (15 gals.).

Iowa—Code of 1935, Sec. 5093-f 2. (50 gals.).

Kansas—1939 Laws, Chap. 226. (20 gals.).

Mississippi—1936 Laws, Chap. 162, Sec. 31. (20 gals.).

Nebraska—Compiled Statutes, 1939 Supplement, Sections 66-426 and 66-427. (20 gals.).

Nevada—1935 Statutes, Chap. 74, Sec. 2. (25 gals.).

New Jersey—1935 Laws, Chap. 319, Sec. 606, p. 1026. (30 gals.).

New Mexico—1937 Session Laws, Chap. 83, Sec. 2. (25 gals.). This was passed to overcome the objection pointed out in *Bingaman* v. *Golden Eagle Western Lines,* 297 U. S. 626. Recites it is a "toll for the use of the highways."

Tennessee—1939 Public Acts, Chap. 81. (18 gals.).

Washington—1939 Session Laws, Chap. 177, Sec. 17. (20 gals.).

Wyoming—1935 Session Laws, Chap. 72, Sec. 14. (20 gals.).

The following decisions of this Court fully sustain appellant's contention.

In *New York ex rel. Silz* v. *Hesterberg, supra* (211 U. S. 31), there was involved a New York statute which forbade possession of certain species of game birds during the closed season in New York, whether killed within that state or elsewhere. The defendant was convicted of possessing game birds killed in Russia during the open season there and imported lawfully to New York during the New York season, but retained by the defendant during the closed season in New York. It was admitted that the imported birds were easily distinguishable at all times from any game birds native to New York. This Court nevertheless sustained the New York statute as applied to the facts of that case on the principle, applicable here, that it was a valuable aid to the enforcement of the game laws of the state. This Court said (p. 40):

> "The object of such laws is not to affect the legality of the taking of game in other states, but to protect the local game in the interest of the food supply of the people of the state."

In *New Mexico ex rel. McLean* v. *D. & R. G. R. Co., supra* (203 U. S. 38), a New Mexico statute was considered which required inspection of all hides being transported out of the state and charged an inspection fee therefor, but did not impose such demands upon hides remaining in the state. Against the claim that the Act discriminated against and burdened interstate commerce, this Court pointed out that the purpose of the law was to combat the stealing of cattle by positively insuring an inspection of brands on hides being shipped out of the state. The Court said (p. 54):

> "But legislation is not void because it meets the exigencies of a particular situation."

In *Bayside Fish Flour Co.* v. *Gentry, supra* (297 U. S. 422), a California statute required licenses of firms processing fish and laid certain stringent requirements, alleged to be discriminatory, upon those using fish for other purposes than human food. The law was sustained under the familiar principle of the state's power to conserve fish and game within its borders. However, the complainant alleged that as applied to him the Act could not be sustained upon that ground, and that it violated the Commerce Clause, because his fish were caught upon the high seas beyond the three-mile limit. This Court said (p. 426):

> "Sardines taken from waters within the jurisdiction of the state and those from without are, of course, indistinguishable; and to the extent that the Act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *Silz* v. *Hesterberg*, 211 U. S. 31."

(427-428):

> "These provisions have a reasonable relation to the object of their enactment—namely, the conservation of the fish supply of the state—and we cannot invalidate them because * * * it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances."

This principle is stated in *Burnet* v. *Wells*, 289 U. S. 670, 678 (which involved an Act of Congress) as follows:

"Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits."

Also in *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 201:

"It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government."

Also in *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388:

"The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity."

Analogous in principle is *Madden* v. *Kentucky*, No. 92, decided January 29, 1940, 84 L. Ed. (adv.) 406, where it is said:

"The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection."

That the Arkansas statute is a necessary aid to the enforcement of the gasoline tax laws of the state is evidenced not only by its title and the legislative history of gasoline taxation in Arkansas, but by a consideration of the record in this case. If all bus and truck companies start following the plan of appellee the collection of the states' gasoline taxes will be seriously affected. The only alternative to complete loss is to devise some plan whereby trucks

and buses can be charged the tax upon the amount of gasoline they actually use in the state. In the case of a few regular-route operators, it may be possible to follow such a plan, but the vast majority of operators do not follow regular routes and have no fixed or regular points of entry to or departure from the state. See Ex Parte No. MC-10, 2 Int. Com. Comm. Rpts., Motor Carrier Cases 703; Ex Parte No. MC-12, 1 id. 628.

Act 67 can easily be and should be sustained upon the principles of the cases above cited. The Court's decision, it is submitted, overlooks the practical necessities of at least fifteen states in the enforcement of gasoline tax laws and the practical needs of motor carriers.

In general, the states follow two different plans for the collection of motor vehicle taxes for the construction and maintenance of highways which those vehicles use. One plan requires high annual lump sum license fees and a low gasoline tax, and the other low annual license fees and a high gasoline tax. This latter plan has been much praised as tending to collect from interstate motor carriers taxes based proportionately upon their use of the states' highways. The gasoline tax has many times been stated to be an equitable tax as a measure of a carrier's use of the highways. The Court's decision defeats those meritorious features of the gasoline tax and will now require the states to revise their laws to require either high annual lump sum license fees of interstate motor carriers or enter upon a difficult and expensive attempt to collect the gasoline tax upon gasoline used in the state.

It is respectfully submitted that the Court should grant a rehearing of this cause and should sustain the Arkansas statute.

Respectfully submitted,

FRANK PACE, JR.,
Attorney for State Revenue Department,
State Capitol,
Little Rock, Arkansas.

AMOS M. MATHEWS,
204 South Canal Street,
Chicago, Illinois.
*Counsel for Appellant.*

## CERTIFICATE OF COUNSEL

The undersigned, counsel for appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

FRANK PACE, JR.,

AMOS M. MATHEWS.